OMAR BIN HAJI JAAFAR v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Briggs, J.) April 2, 1952]

[Alor Star — Criminal Appeal No. 7 of 1952]

Sheraiah Courts Enactment, Kedah, s. 15 — Enticing an unmarried girl out of keeping of her guardian — Whether case is triable with the aid of assessors — Age of majority — Majority Enactment — Courts Ordinance, 1948 — Interpretation and General Clauses Ordinance, 1948.

In this case the appellant was charged under section 15 of the Sheraiah Courts Enactment with enticing an unmarried girl out of the keeping of her guardian. He was tried by the Magistrate with the aid of two assessors and was convicted. He thereupon appealed.

Held, (1) section 28(2) of the Sheraiah Courts Enactment has been impliedly repealed by the Courts Ordinance, 1948, that the introduction of assessors was unlawful but as it appeared that their presence did not affect the trial in any way, this was a mere irregularity; (2) that the case of **Ghouse bin Haji Kadir Mustan v. Rex**(2) was inapplicable in Kedah because of the provisions of Enactment No. 62 (Majority); (3) that the learned Magistrate was wrong in disallowing cross-examination on a number of important points in the evidence and therefore the appeal must be allowed.

Cases referred to:—

(1) *Hujah Lijah v. Fatimah* (1950) M.L.J. 63.

(2) *Ghouse bin Haji Kadir Mustan v. Rex* (1946) M.L.J. 36.

CRIMINAL APPEAL.

Jag-Jit Singh for the appellant.

I. T. Davies (D.P.P.) for the respondent.

Cur. Adv. Vult.

Briggs, J. : — The appellant was charged under section 15 of the Sheraiah Courts Enactment with enticing an unmarried girl out of the keeping of her guardian. He was tried by the Magistrate, Alor Star, sitting with two Muslim assessors under the provisions of section 28 of the same Enactment, as amended in 1937, and was convicted and sentenced to three months rigorous imprisonment. The first, and perhaps the most important, question arising on the appeal, is whether the Magistrate was right in employing assessors to assist him.

Section 50(1) of the Courts Enactment defined the jurisdiction of Magistrates of the Second Class in Kedah prior to 1949. It included power to try all offences punishable with imprisonment for not more than twelve months. The maximum penalty for the offence here in question is six months. Accordingly a Second Class Magistrate had jurisdiction. Section 28(2) of the Sheraiah Courts Enactment reaffirms this by making the offence "triable by any Court having jurisdiction according to the provisions of Enactment No. 25 (Courts)". But it also provides that any such offence shall be tried with the aid of two assessors. Under sub-section (5) their function is "to advise the Court in matters connected with Mohammedan Law." Before the 1937 amendment the assessors had, as far as relevant, the rights, duties and powers given by Chapters XIII & XIV of the Criminal Procedure Code to assessors in the High Court. Does the requirement that the Magistrate shall try the case "with the aid of" assessors apply to the Magistrate's Court which now has jurisdiction by virtue of Part VII of the Courts Ordinance, 1948? It is a different Court with different powers and functions, and it consists of a Magistrate sitting alone. I think there can be no doubt that the pre-1937 provisions, had they still been in force, would have been impliedly repealed. The conception of assessors whose opinions could control the Court's verdict is repugnant to the scheme of Part VII of the Ordinance. Compare the situation considered in *Hujah Lijah v. Fatimah*(1). It is not so clear that the present provisions of section 28(2) are impliedly repealed, but on the whole I am of opinion that they are. Although it does not appear that the assessors' advice would bind the Court, it must tend to affect the Court's decision. The matter is controlled by section 12 of the Interpretation and General Clauses Ordinance, 1948, and the question is whether a "contrary intention appears". The Courts Ordinance, 1948, substituted a unified and homogeneous system of Courts for numerous and widely different local Courts. Any local provision which prescribed special and unusual modes of operation for some of the old Courts may well be thought inappropriate to the new system. I do not think the Federal legislature intended in 1948 that the same type of offence should thereafter be triable in some parts of the Federation by a Magistrate with assessors and in other parts by a Magistrate alone. The preservation of the State enactments relating to Sheraiah Courts themselves is an additional indication that the Civil Courts, so far as they were to deal with religious offences, were intended to operate in the normal manner, and not in any special manner. I think that it is possible to discern in the whole scheme of the Courts Ordinance, 1948, an intention that the reference to Enactment No. 25 (Courts) in section 28(2) of the Sheraiah Courts Enactment should not after 1948 be construed as a reference to the Courts Ordinance, 1948. That being

so, section 12 of the Interpretation and General Clauses Ordinance does not operate, and section 28(2) is a dead letter. Jurisdiction now depends on the Courts Ordinance alone. I hold accordingly that the introduction of assessors was unlawful. If it could be shown that they had in any way affected the course of the trial, that would probably render the whole proceedings unlawful; but it was one of Mr. Jag-Jit Singh's grounds of appeal that they had never been consulted, as they should have been. It certainly does not appear that their presence affected the trial in any way, and on this footing I am prepared to treat it as no more than an irregularity which might be disregarded.

Mr. Jag-Jit Singh first took the point that, since the girl in question had attained puberty, she was free from the *patria potestas* and had in law no "guardian". The offence charged could not therefore be committed. He relied on *Ghouse bin Haji Kadir Mustan v. Rex*[2]. As the girl lived with her father, who was her guardian if she had one, the offence of enticing her from her "father's" custody, as opposed to her guardian's, might have been charged. She was in his "keeping" within the meaning of the section even if she was no longer under *patria potestas* and he was not her guardian. I think, however, that the provisions of Enactment No. 62 (Majority) render *Ghouse's case* inapplicable in this State, at least in this particular connection. Although section 2 undoubtedly implies that a guardian has not, where a girl has attained puberty, certain of the rights which one would expect him to have, it does not destroy his right of custody or her person so long as she remains unmarried, and I think that under section 3 this right subsists until she is eighteen. I think this ground of appeal fails.

The next point taken was that certain evidence relating to sexual intercourse between the accused and the girl while she was with him should have been excluded. I do not agree. I think it was admissible to show motive, and possibly also as part of the general circumstances of the transaction. A much more serious objection is that, although the learned Magistrate admitted this evidence, he refused to allow it to be tested by cross-examination. As the complainant's evidence was in effect that she had been raped, great prejudice may have been caused. Medical evidence was available which strongly rebutted the allegation of rape and the learned Magistrate did not allow it to be given. Again, the learned Magistrate brushed aside cross-examination directed to show the falsity of the complainant's evidence that she had been locked up in a room in Penang for about forty-eight hours and could not escape or summon help. Part of it he allowed, but did not record, and part he disallowed altogether. The whole of this evidence was highly relevant on the question of the complainant's credit, which was violently attacked on grounds which appeared to me very substantial. I think that the learned Magistrate was wrong in law on these points and that his errors seriously prejudiced the accused.

The learned Magistrate accepted *in toto* the complainant's evidence. If he had not done so, I doubt if he would or should, have convicted on the remaining evidence. It could be severely criticized on many grounds. For all these reasons, I think the conviction cannot stand. The appeal is allowed and the conviction and sentence are set aside.

Appeal allowed.

REGINA v. OOI AH KOW.

[Rev. Crim. Juris. (Spenser Wilkinson, J.) April 3, 1952]

[Penang — Criminal Revision No. 4 of 1952]

Criminal Procedure Code (Cap. 21), ss. 416 and 417 — Whether bail can be granted where there are reasonable grounds for believing that the accused has been guilty of an offence punishable with death or penal servitude for life — Powers of the High Court — Courts Ordinance, s. 57.

The accused in this case was charged with attempted murder under section 307 of the Penal Code and with voluntarily causing hurt in the course of committing robbery or attempting to commit robbery under section 394 of the Penal Code. The Magistrate allowed the accused on bail. The question is whether the learned Magistrate was right in so allowing bail.

Held, (1) that the learned Magistrate had no power to release the accused on bail as there were reasonable grounds for believing that the accused had been guilty of an offence punishable with death or penal servitude for life; (2) that although under section 417 of the Criminal Procedure Code the High Court has an absolute discretion to grant bail in any case, it ought not to do so in cases punishable with death or in cases punishable with penal servitude for life except for exceptional and very special reasons.

Cases referred to:—

(1) *Re K. S. Menon* (1946) M.L.J. 49.

(2) *In re Lim Peng Koi* (1952) M.L.J. 26.

CRIMINAL REVISION.

C. M. Sheridan (D.P.P.) for the Crown.

C. D. D. Hogan for the accused.